Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	File No. EB-01-IH-0030
	)	
SBC Communications, Inc.	)	NAL/Acct. No. 200232080004
	)	
Apparent Liability for Forfeiture	)	FRN 0004-3051-24, 0004-3335-71,
	)	0005-1937-01

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 16, 2002 **Released: January 18, 2002**

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that SBC Communications, Inc. ("SBC") has apparently willfully and repeatedly violated one of the conditions that the Commission imposed pursuant to its approval of the merger application of Ameritech Corp. ("Ameritech") and SBC.[1] In particular, it appears that SBC[2] failed to offer shared transport in the former Ameritech states[3] under terms and conditions substantially similar to those that it offered in Texas as of August 27, 1999, in violation of the *SBC/Ameritech Merger Order*. Based upon our review of the facts and circumstances surrounding this matter, we find that SBC is apparently liable for a forfeiture in the amount of six million dollars ($6,000,000.00).

II. BACKGROUND

2. SBC is an incumbent local exchange carrier (ILEC) that provides local telephone service in 13 states, including Arkansas, Kansas, Missouri, Oklahoma, Texas, California, Nevada, Illinois, Michigan, Indiana, Ohio, Wisconsin, and Connecticut. At the end of 1999,

---

[1] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*"SBC/Ameritech Merger Order"*), *reversed in part on other grounds*, Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C.Cir. 2001).

[2] SBC refers to SBC Communications, Inc. and all its affiliates, including its incumbent LECs.

[3] Throughout this NAL, we refer to the states located in Ameritech's territory prior to Ameritech's merger with SBC as "the former Ameritech states." These states are: Illinois, Indiana, Michigan, Ohio, and Wisconsin. *See SBC/Ameritech Merger Order*, 14 FCC Rcd at 14719, ¶ 6.

SBC served nearly 60 million local exchange access lines in its 13-state region, and served customers in 23 countries.[4] SBC also provides in-region interLATA, wireless, Internet access, out-of-region interLATA, cable and wireless television, and directory publishing services.[5] In 2000, SBC had total operating revenues of more than $51 billion.[6]

3. In the *SBC/Ameritech Merger Order*, the Commission approved license transfers to SBC subject to several conditions that were first proffered by the applicants and then incorporated into the Merger Order as an express condition of the grant of approval.[7] One condition related to SBC's provision of shared transport in the former Ameritech states. Paragraph 56 of the merger conditions states that:

> Within 12 months of the Merger Closing Date (but subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport), SBC/Ameritech shall offer shared transport in the SBC/Ameritech Service Area within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offers to telecommunications carriers in Texas as of August 27, 1999.[8]

4. On April 12, 2001, the Enforcement Bureau directed SBC to submit a sworn written response to a series of questions relating to SBC's compliance with paragraph 56 of the merger conditions.[9] SBC filed its responses on May 2, May 14, and July 23, 2001.[10] Based on SBC's responses, we conclude below that SBC apparently violated this condition in each of the five former Ameritech states by refusing to offer shared transport to be used to provide intraLATA toll.

---

[4] *SBC Communications Inc. 1999 Annual Report* at 6 ("*SBC 1999 Annual Report*"). In its *2000 Annual Report*, SBC reported that its total access lines increased by approximately 1% from the previous year. *SBC Communications Inc. 2000 Annual Report* at 7 ("*SBC 2000 Annual Report*").

[5] *SBC 1999 Annual Report* at 4. *See also SBC 2000 Annual Report* at 33-34.

[6] *SBC 2000 Annual Report* at 4.

[7] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14954, ¶ 584.

[8] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[9] Letter from David H. Solomon, Chief, Enforcement Bureau, FCC, to Cassandra Carr and Sandra L. Wagner, SBC Telecommunications, Inc., dated April 12, 2001.

[10] Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, dated May 2, 2001 ("*May 2 Response*"); Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, dated May 14, 2001 ("*May 14 Response*"); Letter from Christopher M. Heimann, SBC Telecommunications, Inc., to Suzanne Tetreault, Assistant Chief, Enforcement Bureau, FCC, dated July 23, 2001 ("*July 23 Response*"). *See also* Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to David H. Solomon, Chief, Enforcement Bureau, FCC, dated October 10, 2001 ("*October 10 Letter*"), which includes an attachment that "summarizes the evidence presented" in prior submissions and meetings.

III. DISCUSSION

5. Under section 503(b) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorization issued by the Commission, shall be liable for a forfeiture penalty.[11] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[12] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[13] As set forth in more detail below, we conclude under this standard that SBC is apparently liable for a forfeiture for its apparent violations of the Merger Order.

6. The fundamental issue in this investigation is whether SBC, as required by paragraph 56 of the merger conditions, has offered shared transport in the Ameritech states on terms "substantially similar to (or more favorable than)" the most favorable terms it offered in Texas as of August 27, 1999. Based on the facts set forth below, we find that it apparently has not. We find that in each of the five former Ameritech states, SBC has apparently violated its obligations under the paragraph 56 condition, and that this apparent failure to comply is apparently willful and repeated.[14] We propose a forfeiture in the amount of six million dollars.

A. Apparent Violations of the Merger Conditions

7. This investigation has focused on SBC's compliance with paragraph 56 of the merger conditions with respect to one particular aspect of SBC's shared transport offerings – the use of the shared transport UNE to route intraLATA toll calls. As described more fully below, subsequent to the effective date of the merger conditions, SBC apparently attempted to restrict or prohibit the use of shared transport for routing intraLATA toll calls in the Ameritech states. SBC asserts that the restrictions it sought to impose are not less favorable than its August 27, 1999 offering in Texas. We disagree. On August 27, 1999, SBC had at least two interconnection agreements in Texas pursuant to which it offered CLECs the option of using shared transport to route intraLATA toll calls, without restriction, between their end user customers and customers served by SBC. In the Ameritech states, by contrast, SBC has opposed

---

[11] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

[12] 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

[13] *See, e.g. Tuscola Broadcasting Co.*, Memorandum Opinion and Order, 76 FCC 2d 367, 371 (1980) (applying preponderance of the evidence standard in reviewing Bureau level forfeiture order). *Cf.* 47 U.S.C. § 312(d) (assigning burden of proof in hearings to Commission).

[14] The term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules, and repeated means more than once. *See Southern California Broadcasting Co., Licensee, Radio Station KIEV(AM) Glendale, California*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88, ¶ 5 (1991); *see also Liability of Hale Broadcasting Corp. Licensee of Radio Station WMTS Murfreesboro, Tennessee*, Memorandum Opinion and Order, 79 FCC 2d 169, 171, ¶ 5 (1980). Furthermore, a continuing violation is "repeated" if it lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5.

carriers' requests for agreements that would permit them to use shared transport for intraLATA toll traffic.[15] Thus, it appears that SBC has violated paragraph 56 of the merger conditions.

8. SBC disputes that it was offering shared transport for routing intraLATA calls pursuant to the agreements that were in place in Texas on August 27, 1999.[16] Thus, we review here the facts about SBC's Texas offering.

9. At the beginning of 1999, at least two CLECs in Texas, Sage Telecom, Inc. (Sage) and Birch Telecom of Texas, Ltd. (Birch), were using shared transport purchased from SBC to route intraLATA toll calls between their end user customers and customers served by SBC.[17] In April 1999, however, SBC notified CLECs that it intended to put an end to such use of shared transport once intraLATA dialing parity was implemented.[18] SBC informed CLECs that in the future, intraLATA toll calls would be routed off the SBC network to a non-SBC tandem switch, and then back again to the SBC network.[19] In other words, once dialing parity was implemented, shared transport could no longer be used to route intraLATA toll calls end-to-end between CLEC and SBC customers.

10. Sage and Birch objected to this new plan, and filed complaints with the Public Utility Commission of Texas alleging that SBC's plan would violate their interconnection agreements.[20] SBC asserted that, to the contrary, the interconnection agreements provided that shared transport could be used for end-to-end routing of intraLATA toll calls *only until the implementation of intraLATA dialing parity*, and that SBC's proposed routing change therefore

---

[15] *See May 2 Response*, Sworn Statement of Deborah A. Golden at 1 and Exhibit 1.

[16] *See, e.g., May 2 Response*, Sworn Statement of Michael C. Auinbauh, response to question 4.

[17] *See Complaint of Birch Telecom of Texas, LTD., L.L.P. and Alt Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal to Provide IntraLATA Equal Access Functionality, and Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions of the Interconnection Agreement*, Arbitration Award, Docket Nos. 20745 and 20755 (Pub. Util. Comm'n of Texas, Nov. 4, 1999) ("*Texas Arbitration Award*") at 9; *see also Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Complaint, Docket 20755 at 3 (Pub. Util. Comm'n of Texas, filed Apr. 16, 1999); and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Complaint, Docket No. 20745 at 3 (Pub. Util. Comm'n of Texas, filed Apr. 15, 1999). Those carriers used shared transport to provide all of the necessary transmission and routing between the two customers' end offices. We refer to this arrangement in this order as "end-to-end" routing of intraLATA toll calls.

[18] *May 2 Response*, Sworn Statement of Michael C. Auinbauh at Exhibit A ("Accessible Letter," dated April 6, 1999).

[19] *See Texas Arbitration Award* at 9. This would have resulted in intraLATA toll calls being routed in the same way as interLATA calls.

[20] *Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Complaint, Docket No. 20755 (Pub. Util. Comm'n of Texas, filed Apr. 16, 1999); and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Complaint, Docket 20745 (Pub. Util. Comm'n of Texas, filed Apr. 15, 1999).

did not conflict with the agreements.[21] SBC's obligations under paragraph 56 of the merger conditions hinge on which of these parties is correct about the scope of SBC's Texas offering, as established by its interconnection agreements. In considering this issue, we have the benefit of the fact that the Texas PUC has already resolved this dispute between the parties.

11. In November 1999, an arbitration panel of the Texas PUC issued an order rejecting SBC's arguments and ruling that SBC's agreements with Sage and Birch require SBC to provide shared transport for routing intraLATA toll traffic regardless of whether dialing parity has been implemented.[22] The full PUC shortly thereafter approved the *Texas Arbitration Award*.[23] Thus, the Texas PUC has interpreted agreements that were in place on August 27, 1999 as offering CLECs the ability to use the shared transport UNE to route intraLATA toll calls end-to-end, without the restrictions that SBC sought to impose in the Ameritech states.[24]

12. While admitting that the *Texas Arbitration Award* has not been modified, reversed, or overruled,[25] SBC apparently disagrees with the Texas PUC's decision, as it raises arguments in its response to the Bureau's LOI that were already expressly considered and rejected by the Texas PUC.[26] Given the special expert position of the Texas Commission in interpreting Texas interconnection agreements, we accept the interpretation set forth in the *Texas Arbitration Award*, and reject SBC's attempt to persuade us to take a different view.[27]

---

[21] *Texas Arbitration Award* at 5-6; *see also May 2 Response*, Sworn Statement of Michael C. Auinbauh, Response to Question 4.

[22] *Texas Arbitration Award*, *supra* n.19. We note that the *Texas Arbitration Order* phrased the issue in terms of whether the interconnection agreements allowed SBC, post-dialing parity, to route intraLATA toll calls in the same way as interLATA toll calls. This is equivalent, however, to the question of whether SBC could, as it proposed, stop providing shared transport end-to-end and instead route intraLATA toll calls off the SBC network to a non-SBC tandem switch, and then back again to the SBC network. *See* note 21, *supra*.

[23] *Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Docket No. 20755, and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Order, Docket 20745 (Pub. Util. Comm'n of Texas, Dec. 1, 1999).

[24] Notably, the Texas PUC found that the interconnection agreement "provides that the UNE common transport permits a CLEC to utilize [SBC's] common network between a [SBC] tandem and a [SBC] end office [and it] neither differentiates between the originating and terminating side of the routing scheme nor makes a distinction between pre- and post-dialing parity environments." *Texas Arbitration Award* at 31.

[25] *May 2, 2001 Response*, Sworn Statement of Michael C. Auinbauh at 4.

[26] SBC asserts that it need not allow the use of shared transport to route intraLATA toll calls in a post-dialing parity environment because its agreements with Sage and Birch say that "[a]fter implementation of intraLATA Dialing Parity, intraLATA toll calls from [CLEC][unbundled local switching ports] will be routed … [to] the end user intraLATA Primary Interexchange Carrier (PIC) choice." *May 2 Response*, Sworn Statement of Michael C. Auinbauh, Response to Question 4, *citing* Interconnection Agreement Between Southwestern Bell Tel. Co. and Sage Telecom, Inc., App. Pricing-UNE § 5.2.2.2.1.2; Interconnection Agreement Between Southwestern Bell Tel. Co. and Birch Telecom of Texas, Ltd., App. Pricing-UNE § 5.2.2.2.1.2. The *Texas Arbitration Award* explains, however, that SBC based its argument in Texas on this same language, and concludes that "[t]he Arbitrators reject SWBT's position." *Texas Arbitration Award* at 12-13.

[27] We note that SBC's responses indicate that, in all five of the Ameritech states, it has affirmatively opposed requests for such service before the state commissions. *See, e.g., Investigation Into Tariff Providing*

13. SBC also argues that it has not violated the merger conditions because (1) the *Texas Arbitration Award* imposed a new obligation that was not in place on August 27, 1999, and thus is not relevant to SBC's obligations under the merger conditions,[28] and (2) SBC was not "offering" shared transport for intraLATA toll on August 27, 1999, because it allowed Birch and Sage to use shared transport on that date only because the PUC had temporarily enjoined it from implementing the routing changes it proposed in April. We find no merit in either of these contentions. It is quite clear that the *Texas Arbitration Award* constitutes a review of SBC's obligations under its *existing* agreements, and not a policy decision to impose new requirements. The arbitrators set forth the issues in terms of what the interconnection agreements require, and engaged in an analysis of specific language from the agreements to determine what SBC's obligations were.[29] Moreover, SBC seems to have understood contemporaneously that the Texas proceeding was interpreting an existing agreement, as it apparently made arguments about the

Unbundled Local Switching With Shared Transport, Order, Case No. 00-0700 (Ill. Commerce Comm., Nov. 1, 2000), Exhibit 1(v) to Sworn Statement of Deborah A. Golden (Golden Exhibit), submitted with SBC May 2 response (investigating an Illinois Bell Telephone Company tariff on the issue of whether Ameritech's restrictions on the shared transport offering are appropriate, and specifically whether shared transport should be available for use by CLECs in transporting their intraLATA toll traffic); *AT&T Communications of Indiana, Inc. TCG Indianapolis Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Ameritech Indiana's Submission of Proposed Order, Cause No. 40571-INT-03 at 69-71 (Ind. Util. Reg. Comm'n, filed Oct. 10, 2000), Golden Exhibit 1(b) (proposed ruling that Ameritech should be permitted to prohibit AT&T's use of shared transport for intraLATA toll traffic); *AT&T Communications, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Ameritech Ohio's Response to AT&T's Petition for Arbitration, Case No. 00-1188-TP-ARB at 19 (Pub. Util. Comm'n of Ohio, filed July 25, 2000), Golden Exhibit 1(k) (arguing that AT&T should not be permitted to use shared transport for intraLATA toll traffic; *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Ameritech Michigan's Reply Brief, Case No. U-12622 (Mich. Pub. Serv. Comm'n, filed December 28, 2000) (defending a tariff filing that prohibited use of shared transport for intraLATA toll service); Ameritech Michigan's Exceptions to the Proposal for Decision at 4-8 (filed February 12, 2001), Golden Exhibit 1(h) (arguing that the Merger Order does not require Ameritech to allow the use of shared transport for intraLATA toll service); *Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin)*, Ameritech Wisconsin's Initial Post-Hearing Brief, Docket No. 05-MA-120 at 74 (Pub. Serv. Comm'n of Wisconsin, filed September 22, 2000), Golden Exhibit 1(o) (arguing that Ameritech may prohibit AT&T's use of shared transport for intraLATA toll traffic).

[28] In essence, SBC argues that "[i]t was not until November 4, 1999—more than two months after the relevant date for purposes of the Merger Conditions—that the Texas PUC issued its arbitration order forcing Southwestern Bell to accept such a request." *See May 2 Response*, Exhibit C at 4. Thus (according to SBC), it was not until that later date that there were "terms [Southwestern Bell] offer[ed] to telecommunications carriers in Texas" that allowed them to use Southwestern Bell's interexchange network to complete intraLATA toll calls. *Id*. We note, however, that prior to August 27, 1999, the Texas PUC issued an interim order requiring SBC to offer shared transport to Birch and Sage for the routing of CLEC-originated intraLATA toll traffic. *See May 2 Response*, Sworn Statement of Michael C. Auinbauh, Response to Question 4, *citing Birch Telecom of Texas, Ltd., LLP v. Southwestern Bell Tel. Co*., Order Issuing Interim Ruling Pending Dispute Resolution, Docket Nos. 20745 & 20755 at 3 (Pub. Util. Comm'n of Texas, Apr. 26, 1999).

[29] For instance, as discussed above, the arbitrators specifically considered the significance of section 5.2.2.2.1.2 of the pricing appendix.

proper interpretation of that agreement.[30] Thus, although the *Texas Arbitration Award* was not issued until November 1999, it describes obligations that were in effect in August. Moreover, SBC's argument that the arbitrators' injunction demonstrates that it did not "offer" shared transport for routing intraLATA toll calls has no persuasive force in light of the Texas PUC's ultimate conclusion that SBC's agreements already obligated it to do so.[31]

14. SBC also argues that the way in which CLECs have requested to route intraLATA traffic does not constitute "shared transport" within the meaning of paragraph 56 of the Merger Conditions. First, SBC asserts that:

> the facilities that SBC's ILECs use to complete intraLATA toll calls are distinct from the 'shared transport' that SBC is required to unbundle under the Commission's rules. Paragraph 56 of the Merger Conditions, which by its terms has to do with the terms and conditions on which Ameritech would offer the shared transport UNE, therefore has nothing whatsoever to do [with the issue under investigation].[32]

We disagree. The Merger Conditions define "shared transport" as that term is defined in the Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460 (1997). That order defines shared transport as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, *between end office switches and tandem switches*, and between tandem switches, in the incumbent LEC's network."[33] The intraLATA toll arrangements that CLECs in the Ameritech states have requested (and that the Texas Commission found to be required in Texas) consist of routing *between end office switches and tandem*

---

[30] *See Texas Arbitration Award* at 9 ("according to [SBC], in a post-dialing parity environment, the interconnection agreement requires CLECs to route their intraLATA traffic in a different manner."). In another context, SBC also seems to recognize that the *Texas Arbitration Award* did not create new obligations, but interpreted an existing agreement. *See* Ex Parte Presentation from Edwardo Rodriguez Jr., Director - Federal Regulatory, SBC, filed December 22, 2000 in CC Docket No. 00-217, Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to provide in-region interLATA service in the States of Kansas and Oklahoma (committing to "interpret ... sections of [Kansas and Oklahoma interconnection agreements] in exactly the same fashion that it was ordered to" interpret identical provisions in Texas agreement in the *Texas Arbitration Award*).

[31] Moreover, we note that the language of paragraph 56 of the merger conditions made no exception for this issue, even though the issue was being litigated in Texas at the same time that the Commission was reviewing and finalizing the text of the conditions.

[32] *May 2 Response* at Exhibit C, page 4.

[33] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 at Appendix A, rule 51.319 (1997) (emphasis added). *See* 47 C.F.R. § 51.319.

switches.[34] Therefore, we reject SBC's contention that the facilities that would be used to route intraLATA traffic do not fit within the definition of shared transport.

15. In addition, SBC argues that the Merger Order's shared transport obligation is restricted to the use of shared transport for purely *local* service, and does not extend to intraLATA toll routing.[35] We disagree with SBC's assertion that the definition of shared transport encompasses such a use restriction. The definition contained in the *Local Competition Third Order on Reconsideration* does not distinguish between purely local services and long distance services. Moreover, we note that when both the Merger Order and the *Local Competition Third Order on Reconsideration* were adopted, the Commission had in place a rule prohibiting use restrictions on UNEs.[36] Thus, we are unpersuaded by SBC's attempt to read such a use restriction into its obligations under the merger conditions.

16. SBC's responses indicate that in all five of the Ameritech states, it has refused to offer shared transport for end-to-end routing of intraLATA toll calls, and indeed has affirmatively opposed requests for such service before the state commissions. It continued to do so even after the *Texas Arbitration Award* made undeniably clear its obligations in Texas. Thus, we find that SBC has apparently violated paragraph 56 of the merger conditions, in each of the Ameritech states.

17. In addition to arguing that it has complied with the merger conditions, SBC argues that the paragraph 56 condition is no longer applicable. In its more recent responses to the Bureau's inquiry letter, SBC argues that the requirement that it provide shared transport in the former Ameritech states on "terms and conditions … substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offer[ed] to telecommunications carriers in Texas as of August 27, 1999" was terminated by the Commission's *UNE Remand Order*.[37] By its terms, paragraph 56 was "[s]ubject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport."[38] SBC asserts that because the *UNE Remand Order* addressed the obligation of an incumbent LEC to make shared transport available to CLECs,[39] any obligation to provide

---

[34] The *Texas Arbitration Award* makes clear that the routing being requested there by CLECs does in fact meet this definition. *See Texas Arbitration Award* at 7-9 and Appendix A, which contains diagrams showing explaining that intraLATA calls would be routed using "option 2" as set forth at those pages, which consists of routing between end offices and tandems.

[35] *October 10 Letter* at 5-9.

[36] *See* 47 C.F.R. § 51.309(a), which provides that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."

[37] *July 23 Response* at 7-12. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

[38] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[39] *UNE Remand Order*, 15 FCC Rcd at 3862-66, ¶¶ 369-79.

shared transport pursuant to paragraph 56 of the Merger Conditions terminated upon release of the *UNE Remand Order*.[40] We disagree. The *UNE Remand Order* was adopted on September 15, 1999, three weeks *before* the *SBC/Ameritech Merger Order* was adopted on October 6, 1999.[41] Thus, the *UNE Remand Order* cannot plausibly be considered a "future Commission order" under paragraph 56 of the Merger Conditions. We reject the suggestion that the Commission would have imposed a merger condition that had already been superseded by other events that were obviously well-known to the Commission at the time the *SBC/Ameritech Merger Order* was adopted.

18. Even if it were a "future Commission order," nothing in the UNE Remand Order appears to supersede the requirements imposed by paragraph 56. Here, again, SBC argues that the obligation to provide shared transport extends only to the use of that UNE in connection with purely local service, not intraLATA toll.[42] As noted above, however, the definition of shared transport in the UNE Remand Order (*i.e.*, the *Local Competition Third Order on Reconsideration*) contains no such express restriction, and the Commission's rules generally prohibit ILECs from imposing use restrictions on UNEs. Moreover, we note that in a decision that post-dates the UNE Remand Order, the Commission treated an allegation that SBC had unlawfully precluded competitors from using UNEs to provide intraLATA toll service as a section 271 checklist compliance issue. Thus, by implication, the Commission treated the matter as an issue of compliance with the Commission's UNE unbundling rules.[43]

19. Finally, SBC argues that the Bureau (and presumably, the Commission) lacks authority to adjudicate this matter based on the merger conditions.[44] SBC notes that paragraph 56 states that its requirements are "subject to state commission approval." Thus, SBC asserts that enforcement of that paragraph "requires resort to state commission arbitration procedures." We find SBC's interpretation to be unsupported by the *SBC/Ameritech Merger Order*, and reject SBC's attempt to persuade us not to enforce our own order. The cited clause merely refers to the requirement that the interconnection agreements be approved by the state regulatory body.

B. Forfeiture Amount

20. In light of SBC's apparent willful and repeated failure to comply with the *SBC/Ameritech Merger Order*, we find that a substantial proposed forfeiture is warranted.

---

[40] *July 23 Response* at 7-12.

[41] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14712; *UNE Remand Order*, 15 FCC Rcd at 3696.

[42] *October 10 Letter* at 10.

[43] *See Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6322-23, ¶ 174 (2001), *remanded on other grounds*, Sprint Communications Co. v. FCC, __ F.3d __ (D.C.Cir. 2001), 2001 WL 1657297 (D.C.Cir).

[44] SBC also argues that the Commission lacks enforcement jurisdiction under section 251 of the Act. *May 2 Response*, Exhibit C at 5-6. Because we base this violation on the merger conditions, and not section 251, we need not address this issue.

Section 503(b)(1) of the Act states that any person that willfully or repeatedly fails to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission, shall be liable to the United States for a forfeiture penalty.[45] Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $120,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,200,000 for a single act or failure to act.[46] In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[47]

21. In response to the Bureau's letter, SBC has stated that the issue of SBC's obligation to allow intraLATA toll traffic to be routed over shared transport facilities was currently before the state commissions or state arbitrators in proceedings in each of the five Ameritech states. In each of those states, SBC failed to offer shared transport on the required terms and conditions, and affirmatively objected to requests for such service.[48] Thus, SBC has apparently violated the requirements of the Merger Order in at least five instances, one in each state. Each of these is a continuing violation, beginning on October 8, 2000 (12 months after the close of the merger), and continuing at least until the date of SBC's May 14, 2001 response to the Bureau's letter of inquiry in four of the five Ameritech states (*i.e.*, Ohio, Indiana, Illinois, and Wisconsin), and until March 2001 in Michigan.[49] Each continuing violation is potentially subject to the statutory maximum forfeiture of $1,200,000.

22. Considering all the circumstances before us, we find SBC apparently liable for a forfeiture in the amount of $6,000,000, the statutory maximum for five continuing violations lasting at least ten (10) days each during the one-year period prior to this Notice of Apparent Liability. First, the Commission emphasized in the Merger Order that it would hold SBC to a high standard of compliance, stating that "[w]e expect that SBC/Ameritech will implement each

---

[45] 47 U.S.C. §503(b)(1)(A); *see also* 47 C.F.R. § 1.80(a)(1).

[46] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R § 1.80(b)(2). In September 2000, the Commission increased the maximum forfeiture amount from $1,100,000 to $1,200,000 per violation to account for inflation. *See Amendment of Section 1.80(B) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000). That change became effective November 13, 2000. *See* 65 FR 60868 (October 13, 2000).

[47] 47 U.S.C. § 503(b)(2)(D); *see also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, Report and Order, 12 FCC Rcd 17087, 17100 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

[48] *See* note 27, *supra*.

[49] The Michigan Public Service Commission has required Ameritech to file tariffs in Michigan that would permit CLECs to use Ameritech's shared transport to provide intraLATA toll. *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Opinion and Order, Case No. U-12622 at 6-16 (Mich. Pub. Serv. Comm'n, March 19, 2001). Ameritech filed a tariff offering this capability, which became effective March 30, 2001. *See CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc. et al.*, Joint Statement, File No. EB-01-MD-017 (filed Oct. 23, 2001).

of these conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions."[50] Second, we find it particularly egregious that SBC refused to make shared transport available on the same terms available in Texas, even after the *Texas Arbitration Award* made not only "ascertainably certain,"[51] but abundantly clear, what SBC's obligations under its interconnection agreements were. Instead, SBC has continued to argue to state commissions, and to this Commission, that the *Texas Arbitration Award* imposed only new obligations, despite the fact that the order states clearly that it was interpreting existing obligations. SBC's apparent violations have forced other carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to provide. Third, the Commission has made clear that it will take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against "large or highly profitable entities are not considered merely an affordable cost of doing business."[52] These factors together persuade us that we should propose the statutory maximum forfeiture.

IV. ORDERING CLAUSES

23. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,[53] and section 1.80 of the Commission's Rules,[54] SBC Communications is HEREBY NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of six million dollars ($6,000,000.00) for willfully and repeatedly violating the Commission's merger conditions in the *SBC/Ameritech Merger Order*.

24. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's Rules, within thirty (30) days of the release date of this NOTICE OF APPARENT LIABILITY, SBC Communications SHALL PAY to the United States the full amount of the proposed forfeiture OR SHALL FILE a written statement showing why the proposed forfeiture should not be imposed or should be reduced.

25. Payment of the forfeiture amount may be made by mailing a check or similar instrument payable to the order of the Federal Communications Commission, to the Forfeiture

---

[50] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14858, ¶ 360 (citations omitted).

[51] Due process requires that parties receive fair notice before being deprived of property. In the absence of notice, the courts ask whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform." *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir.2000), *quoting General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir.1995).

[52] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17099-100, ¶ 24 (1997). With revenues of more than $51 billion in the year 2000, SBC plainly falls into the category of companies to which the Commission was referring.

[53] 47 U.S.C. § 503(b).

[54] 47 C.F.R. § 1.80.

Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the "NAL/ Acct. No." referenced above.

26. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearing Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street S.W., Room 5-C814, Washington, D.C., 20554, and must include the "NAL/Acct. No." referenced above.

27. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation provided.

28. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability shall be sent by Certified Mail/Return Receipt Requested to SBC Communications, c/o Caryn D. Moir, Vice President-Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary